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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107-4431

July 1, 1994

Marc G. Tarlow, Esquire
Kain, Brown & Roberts
119 East Market Street
York, Pennsylvania 17401-1278

Re: City of York Administrative Settlement
U.S. EPA Docket No. III-92-37 DC

Dear Marc:

This letter serves as written notice that the Regional Administrator entered the above-referenced settlement as final on June 30, 1994. After a careful review of the comments received during the public comment period, he determined that the comments did not indicate that the proposed settlement is inappropriate, improper, or inadequate. I enclose the RA's determination, the comments and EPA's response for your review.

Please note that the terms of the AOC require payment within six months of the effective date of the Consent Order. Pursuant to paragraph 16 of the Consent Order, July 1, 1994 is the effective date of the AOC.

Please call me if you have any questions concerning this matter. I may be reached at 215-597-3440.

Very truly yours,

Patricia C. Miller
Assistant Regional Counsel

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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Philadelphia, Pennsylvania 19107-4431

DETERMINATION BY THE REGIONAL ADMINISTRATOR
THAT THE SETTLEMENT PURSUANT TO CERCLA § 122(h),
42 U.S.C. § 9622(h), ADMINISTRATIVE ORDER ON CONSENT,
EPA DOCKET NO. III-92-37 DC, IS FINAL

This is to certify that I have reviewed the comments submitted pursuant to CERCLA § 122(i), 42 U.S.C. § 9622(i), and the responses set forth by U.S. EPA - Region III concerning the settlement embodied in the Administrative Order on Consent, EPA Docket No. III-92-37 DC, and have determined that the comments submitted do not disclose facts or considerations which indicate that the proposed settlement is inappropriate, improper, or inadequate and therefore this settlement shall be FINAL.

DATE:

Peter H. Kostmayer
Regional Administrator
U.S. EPA Region III

RESPONSIVENESS SUMMARY TO COMMENTS RECEIVED BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY CONCERNING THE PROPOSED ADMINISTRATIVE SETTLEMENT BETWEEN THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE CITY OF YORK, INC. (EPA DOCKET NO. III-92-37 DC)

I. Background

On April 12, 1993, the United States Environmental Protection Agency ("EPA") issued an Administrative Order on Consent ("AOC") EPA Docket No. III-92-37 DC, to the City of York, Inc. ("York") to resolve York's present liability for all costs incurred and to be incurred by the United States in connection with a response action at the Old City of York Landfill (the "Site") York County, Pennsylvania.

EPA entered into this proposed settlement with York pursuant to the authority vested in the Administrator of EPA by Section 122(h) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("CERCLA"), 42 U.S.C. § 9622(h). The authority to enter into the AOC was delegated to the Regional Administrators pursuant to Delegation 14-14-D (September 13, 1987). EPA based the proposed settlement upon the limited financial ability of York to pay for a response action at the Site. On April 2, 1993, the EPA received the written pre-approval of the Assistant Attorney General, approving such a settlement pursuant to 42 U.S.C. § 9622(h)(1).

On April 28, 1993, notice of the proposed settlement was published at 58 Fed. Reg. 25834 (April 28, 1993) for a thirty (30) day public comment period pursuant to 42 U.S.C. § 9622(i). The comment period closed May 28, 1993. Five sets of comments were received and reviewed by EPA and the Department of Justice, and are addressed herein. EPA has determined that the comments submitted do not disclose facts or considerations which indicate that the proposed settlement is inappropriate, improper, or inadequate, and therefore enters this settlement as **Final.**

II. Comments and Responses

1. Comment: EPA does not have the authority under CERCLA § 122(h) to settle for its future costs. The plain language of CERCLA § 122(h)(1) permits EPA to settle only "for costs incurred" by the government. The use of the past tense indicates that the statute was not intended to authorize EPA to settle for costs it is yet to incur. Furthermore, the legislative history of CERCLA § 122(h) demonstrates that Congress intended only to allow EPA to settle for past costs incurred.

Response: EPA has the broad, discretionary authority under CERCLA § 122(h) to settle its claims based upon present

liability for both past and future response costs under CERCLA. Courts have held that the broad settlement authority granted to the President and Attorney General and delegated to the EPA in CERCLA § 122 can be diminished only by a "clear and unambiguous directive from Congress." U.S. v. Hercules, Inc., 961 F.2d 796, 798 (8th Cir. 1992)(holding that CERCLA § 122 imposes no limitations on the Attorney General's authority to settle cases in which the United States is a party). Courts have recognized the need to prevent conflicts of interest, or "sweetheart deals," as the principal limitation on the Attorney General's authority to settle. See, e.g., U.S. v. Vertac Chemical Corp., 756 F.Supp. 1215, 1219 (E.D. Ark. 1991).

On at least two occasions, courts have recognized that settlement of both past and future costs of CERCLA § 106 remedial actions is well within the EPA's settlement authority in 122(d) as delegated by the Attorney General. In United States v. Vertac Chemical Corp., supra, a non-settling party challenged EPA's authority to settle with a non-de minimis party under CERCLA § 122. The non-settling party contended that EPA lacked the authority to enter a consent decree providing for a cash-out for past and future response costs and to provide contribution protection. The court rejected the argument that the language of CERCLA § 122(d) limits EPA's broad settlement authority. "The court is not persuaded that the statutory language of section 122 is to be construed so narrowly. CERCLA is a remedial statute, and the EPA must be granted some discretion in fashioning settlements which are fair and reasonable under the circumstances, while furthering the objectives of CERCLA." Id. at 1218.

Similarly, in United States v. Bell Petroleum Services, Inc., 32 ERC 1296 (W.D. Tex. 1990), rev'd and rem'd on other grounds, 3 F.3d 889 (5th Cir. 1993), EPA settled its future costs and provided the settling parties with contribution protection under CERCLA § 122(d). The court upheld this settlement against a challenge by the non-settling parties, stating that EPA possessed "inherent powers to settle a CERCLA action and this Court is of the opinion such inherent authority indeed exists and is not limited by Section 9622 of CERCLA." Id. at 1298. These cases clearly indicate the broad scope of EPA's discretionary authority to enter into reasonable settlements for both past and future response costs.

The EPA's settlement authority in CERCLA § 122(h) extends to cost recovery of both past and future costs pursuant to CERCLA § 107, just as its settlement authority under CERCLA § 122(d) extends to both past and future costs incurred pursuant to CERCLA § 106 remedial actions. Since courts such as U.S. v. Hercules have not found any clear and unambiguous limitation on the Attorney General's broad settlement authority in CERCLA § 122, it is reasonable to conclude that this proposed settlement, having the pre-approval of the Attorney General, is within EPA's statutory authority.

The Agency's internal guidance documents reflect the broad settlement authority delegated to the EPA by the President. EPA guidance entitled "Interim Cashout Settlement Procedures" (Jan. 7, 1992), states that EPA relies upon CERCLA § 122(b)(3) for its authority to accept cashout payments for future response costs. Section 122(b)(3) of CERCLA provides: "If, as part of any agreement, the President will be carrying out any action and the parties will be paying amounts to the President, the President may, notwithstanding any other provision of law, retain and use such amounts for purposes of carrying out the agreement." 42 U.S.C. § 9622(b)(3). When these agreements include payments by potentially responsible parties ("PRPs") toward future response work by EPA, they are referred to as cashout settlements. "Interim Cashout Settlement Procedures" at 2. EPA interprets the language of CERCLA § 122(b)(3) as granting EPA the authority to accept cashout funds for future costs as part of any settlement under CERCLA, including CERCLA § 122(h). Id. at 2-3.

A second EPA guidance document, "Revised Draft of 'Procedures for Administrative Settlements under Sections 122(h)(1) and (g)(4) of CERCLA'" (Feb. 19, 1992) further explains EPA's authority to settle for future costs. EPA has the authority under CERCLA § 122(h) to settle with PRPs for their present liability under CERCLA § 107. The guidance recognizes that settlements for future liability, which must be embodied in a consent decree, are markedly different from settlements for future costs, which may be settled under a CERCLA § 122(h) administrative settlement. Id. at 7-8. Because the settlement with the City of York explicitly resolves only York's present liability for EPA's past and future response costs, the cashout settlement is well within EPA's authority under CERCLA § 122(h).

Finally, CERCLA is intended to encourage settlements. See, e.g., United States v. Cannons Engineering Corp., 899 F.2d 79, 84 (1st Cir. 1990). Restricting EPA from accepting cash-out payments in satisfaction of past and future response costs would seriously impair EPA's ability to structure settlements and thereby frustrate the intent of Congress in enacting CERCLA. Where a PRP, as in this case, has limited ability to pay or faces bankruptcy, such a restriction would force EPA to conduct a clean-up and hope that the PRP still had funds available when EPA was finished months or even years later. Furthermore, PRPs would have little incentive to enter settlements with EPA if the settlement would not even resolve the PRP's present liability.

2. Comment: EPA does not have the authority under CERCLA § 122(h) to protect settling parties from the contribution claims of non-settling parties. Both Transtech Industries, Inc. v. A & Z Septic Clean, 798 F. Supp. 1079 (D.N.J. 1992), and Key Tronic Corp. v. United States, No. C-89-694-JLQ (E.D. Wash., Aug. 9, 1990), support the proposition that settlements generally should not cut off the contribution rights of parties performing the work at sites. Also, the plain language of CERCLA § 122(h)(1) provides that administrative settlements can include only costs

incurred "by the U.S. government," not costs incurred by other PRPs. Because CERCLA §§ 113(f)(2) and 122(h)(4) protect settling parties from contribution only with regard to "matters addressed in the settlement," settling parties are not protected from the contribution claims of other PRPs as they are not matters that can be addressed in a Section 122(h) administrative settlement.

Response: Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2), 9622(h)(4), clearly protect settling parties from contribution from "all matters addressed in the settlement". Initially, the commentors argue vaguely that CERCLA §§ 113(f)(2) and 122(h)(4) do not provide settling parties with contribution protection against claims of non-settling PRPs under CERCLA § 107(a) for costs they have incurred directly in cleaning up a site. Transtech, however, does not provide support for this proposition. In Transtech, the court declined to extend the scope of contribution protection to protect settling parties from the contribution claims of non-settlors only because the settlement did not grant such protection. In the present case, it is the intent of the parties to resolve the present liability of York for all "costs incurred and to be incurred by the United States in connection with a response action at the [Site]." Paragraph thirteen of the AOC explicitly provides that the City of York "is entitled to such protection from contribution actions or claims as is provided by Sections 113(f)(2) and 122(h)(4) of CERCLA . . . ." The plain language of the AOC speaks to the matters addressed in the settlement and the scope of the contribution protection of CERCLA §§ 113(f)(2) and 122(h)(4) to be afforded to York.

The interpretation in Key Tronic that CERCLA § 113(f)(2) does not protect a settling party from a CERCLA § 107(a) private cost recovery action has been widely rejected. The great majority of courts have recognized that actions by responsible parties to recover response costs from other responsible parties, whether asserted as cost recovery claims under CERCLA § 107(a) or contribution actions under CERCLA § 113(f), are by their nature, claims for contribution and are therefore barred when the contribution defendants have resolved their liability in a settlement with the United States. In Avnet, Inc. v. Allied-Signal, Inc., 825 F. Supp. 1132 (D.R.I. 1992), the court rejected the claims of non-settling parties that CERCLA § 107(a) provided them with an avenue of recovery separate from Section 113 and its contribution protection provision under Section 113(f)(2), instead ruling that the de minimis settlement afforded contribution protection for all past and future costs addressed in the settlement. See also Dravo Corp. v. Morton Zuber, 804 F. Supp. 1182 (D. Neb. 1992) (affording contribution protection to de minimis settlors under an administrative settlement against the CERCLA § 107(a) cost recovery claims of non-settlors). Several cases involving non-de minimis settling parties have also held that CERCLA 113(f)(2) contribution protection extends to CERCLA § 107(a) private cost recovery claims. See Akzo Coatings, Inc. v. Aigner Corp., 803 F. Supp. 1380 (N.D. Ind. 1992);

Transtech Industries, Inc. v. A & Z Septic Clean, 798 F. Supp. 1079 (D.N.J. 1992); United States v. New Castle County, 769 F. Supp. 591 (D. Del. 1992). It is therefore clear that York is entitled to contribution protection regardless of whether the claims of other PRPs are asserted as CERCLA § 107(a) cost recovery claims or as CERCLA § 113(f) contribution actions because York has resolved its liability to the United States for costs incurred in connection with the past response action and the future response action conducted or to be conducted at the Site. AOC at 7.

Further, the contribution protection afforded by settlements under CERCLA § 122(h) is not limited to past costs incurred. It may extend to costs to be incurred, if those costs are associated with response actions for which the PRP has CERCLA § 107 liability. CERCLA §§ 113(f)(2) and 122(h)(4) provide that "[a] person who has resolved its liability to the United States . . . shall not be liable for claims for contribution regarding matters addressed in the settlement" [emphasis added]. The plain language of the AOC found in paragraph thirteen, reveals the intent of the United States and York to settle York's present liability: "EPA agrees that by entering into and carrying out to EPA's satisfaction all of the terms of this Consent Order, Settlor will have resolved its liability to the United States for costs incurred in connection with the past response action and the future response action conducted or to be conducted at the Site . . . ." Because the City of York has settled its liability with the United States, it is entitled to contribution protection from all claims of non-settling parties.

EPA guidelines demonstrate EPA's significant discretion in providing contribution protection as part of EPA settlements. EPA's CERCLA Settlement Policy, published at 50 Fed. Reg. 5034 (Feb. 5, 1985), recognizes that to subject settling parties to the contribution claims of non-settlors would obviously constitute a disincentive to settlement. Unrestricted contribution claims would undermine both EPA's policy and the intent of CERCLA to strive for prompt settlements. United States v. Cannons Engineering Corp., 899 F.2d 79, 84 (1st Cir. 1990). Granting full contribution protection to York therefore furthers the policy goals of CERCLA and the EPA.

3. Comment: CERCLA requires that settlements with PRPs regarding remedial actions must be entered through a CERCLA § 122(d) consent decree, not through a CERCLA § 122(h) administrative settlement.

Response: A CERCLA § 122(d) consent decree is required when EPA is settling for the performance of a remedial action, after it has filed a civil action pursuant to CERCLA §§106/107. In the instant case, EPA and York have entered into a cash-out settlement, not a settlement under CERCLA §§106/107 for the performance of a remedial action. Additionally, the AOC explicitly directs the funds to be paid to the United States for

its response costs incurred and to be incurred. Although the United States continues to incur response costs, those response costs are not for the performance of the remedial action. The performance of the remedial action is being accomplished under a Unilateral Administrative Order issued to the non-settling PRPs. CERCLA § 122(h) administrative settlements are distinctly separate from CERCLA § 122(d) settlements in the statutory framework. Under the plain language of Section 122(h), EPA has full authority to enter into an administrative settlement with York: "The head of any department or agency with authority to undertake a response action . . . may consider, compromise, and settle a claim under section 9607 of this title . . . " 42 U.S.C. 9622(h)(1). The only restriction is that settlements for over $500,000 receive the written pre-approval of the Department of Justice. On April 2, 1993, EPA received the pre-approval of the proposed settlement with York from the Assistant Attorney General.

4. Comment: The settlement is inconsistent with EPA's internal guidance. Specifically, 1) the settlement violates an EPA guideline requiring EPA to treat municipalities the same way it treats private PRPs, 2) EPA has not released important information regarding the City of York's ability to pay, 3) the settlement is not equitable, and 4) EPA has not analyzed the required criteria in determining to settle.

Response: EPA guidance makes it clear that EPA has broad discretion in entering settlements with municipal PRP's. OSWER Directive 9834.13, while stating that "[s]eparate settlements are not automatically available to municipalities and are generally available to such parties under the same conditions as for private parties," places no restrictions on EPA's settlement authority. OSWER Directive No. 9834.13 at 14, December 6, 1989. For instance, EPA may enter separate settlements whenever it is a de minimis settlement or when it is a cash-out settlement that is consistent with the applicable statutes and existing guidance. Id. Furthermore, the goals of the Directive contemplate handling municipalities and private parties "essentially in the same manner . . . unless separate settlements . . . are appropriate." Id. at Federal Register Notice at 13. Thus, while EPA must generally deal with municipalities and private parties in the same way, EPA has the discretion to treat them differently where appropriate.

In the instant case, EPA has provided York with no special treatment. EPA settlement policy, contained in 50 Fed. Reg. 5034 (Feb. 5, 1985), lists ten criteria for determining whether settlement is proper, including ability to pay. EPA, having analyzed these criteria, determined that settlement with the City of York was proper and subsequently agreed to settle with York upon the payment of $615,000 plus interest. In no way was the City of York treated differently from any other PRP with a limited ability to pay.

Some information upon which EPA based its ability to pay analysis is of public record and is available to the PRPs. However, EPA's analysis of York's ability to pay is protected both by a deliberative process and common-law privilege. OSWER Directive 9835.12 plainly states that information subject to privileges may be withheld if a case-specific determination is made by program personnel and legal counsel that an important purpose is served by withholding the information. Because this information is subject to such a privilege and EPA has deemed an important purpose is served by withholding the information, EPA is not required to disclose it.

EPA settlement guidelines explicitly contemplate that it will be necessary in many cases for a party to pay more than the percentage that it actually contributed to the Site. 50 Fed. Reg. at 5044. Nonproportional settlements are not per se violations of EPA guidance.

EPA has analyzed the ten settlement criteria set forth in EPA's CERCLA Settlement Policy published at 50 Fed. Reg. 5034 (February 5, 1985) in deciding to settle with the City of York. Based upon these criteria, including the City of York's ability to pay, a settlement was reached.

5. Comment: The settlement is unsupported by the administrative record.

Response: The National Contingency Plan ("NCP"), 40 C.F.R. § 300.800, requires EPA to establish an administrative record only with regard to response actions taken under CERCLA § 104 or sought, secured, or ordered under CERCLA § 106. Although EPA guidance suggests that an Administrative Record be created for final EPA decisions, it is after the close of the public notice and comment period, and after the comments are given consideration, that EPA's decision becomes final. EPA carefully reviewed financial information submitted by the City of York in support of its limited ability to pay assertion. Comments received during the public comment period do not indicate that the City of York's poor financial health has changed.

6. Comment: The settlement amounts to a taking of private rights without just compensation without due process of law.

Response: This comment has no basis in law or fact. EPA is exercising its statutory authority to enter into this settlement consistent with EPA's CERCLA Settlement Policy. published at 50 Fed. Reg. 5034 (February 5, 1985).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
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MEMORANDUM-ENFORCEMENT CONFIDENTIAL

SUBJECT: Response to public comments received for the City of York CERCLA § 122(h) administrative settlement and recommendation to the Regional Administrator to enter the settlement as FINAL

FROM: Marcia E. Mulkey
Regional Counsel

Thomas C. Voltaggio
Hazardous Waste Management Director

TO: Peter H. Kostmayer
Regional Administrator

On April 12, 1993 the United States Environmental Protection Agency ("EPA") issued an Administrative Order on Consent ("AOC"), EPA Docket No. III-92-37 DC, to the City of York, Inc. ("York"), to resolve York's present liability for all costs incurred and to be incurred by the United States in connection with a response action at the Old City of York Landfill (the "Site"), York County, Pennsylvania.

EPA entered into this proposed settlement with York pursuant to the authority vested in the Administrator of EPA by Section 122(h) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("CERCLA"), 42 U.S.C. § 9622(h). The authority to enter into the AOC was delegated to the Regional Administrators pursuant to delegation 14-14-D (September 13, 1987). EPA based the proposed settlement upon the limited financial ability of York to pay for a response action at the Site. On April 2, 1993, the EPA received the written pre-approval of the Assistant Attorney General, approving such a settlement pursuant to 42 U.S.C. § 9622(h)(1).

On April 28, 1993, notice of the proposed settlement was published at 58 Fed. Reg. 25834 (April 28, 1993) for a thirty (30) day public comment period pursuant to 42 U.S.C. § 9622(i). The comment period closed May 28, 1993. Five sets of comments were received and are addressed in a Responsiveness Summary, attached. The Department of Justice has reviewed the comments and EPA's response, and concurs with the recommendation to make the settlement final.

We recommend that since the comments submitted do not disclose facts or considerations which indicate that the proposed settlement is inappropriate, improper, or inadequate, this settlement should become final. Please sign the attached document certifying the settlement as FINAL.

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MEMORANDUM-ENFORCEMENT CONFIDENTIAL

SUBJECT: Response to public comments received for the City of York CERCLA § 122(h) administrative settlement and recommendation to the Regional Administrator to enter the settlement as FINAL

FROM: Patricia C. Miller
Assistant Regional Counsel

TO: Marcia E. Mulkey
Regional Counsel

Thomas C. Voltaggio
Hazardous Waste Management Director

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Please recommend to the Regional Administrator that since the comments submitted do not disclose facts or considerations which indicate that the proposed settlement is inappropriate, improper, or inadequate, this settlement should become final.